RECENT CASES

Criminal Law—

DEFENDANT'S REFUSAL TO ANSWER ELEVEN QUESTIONS DESIGNED TO ASCERTAIN COMMUNIST ASSOCIATIONS OF CO-CONSPIRATORS HELD ELEVEN SEPARATE CONTEMPTS

At the trial of petitioner and co-defendants for conspiracy to violate the Smith Act,[1] petitioner took the stand in her own defense. She voluntarily waived the privilege against self-incrimination, but while under cross-examination refused to answer eleven different questions concerning her association with the other defendants, on the ground that she would not be an informer. In each instance the court instructed petitioner to answer and, upon her refusal to do so, declared her in contempt. At conclusion of the session, the court announced that it would treat each refusal as a separate criminal contempt pursuant to rule 42(a) of the Federal Rules of Criminal Procedure. Accordingly, petitioner was sentenced to one year imprisonment for each of the eleven separate contempts, the sentences to run concurrently.[2] The court of appeals, in affirming, held that the sentences indicated no abuse of discretion. *Yates v. United States,* 227 F.2d 851 (9th Cir. 1955), *cert. granted,* 350 U.S. 947 (1956).

The Judicial Code[3] and the Federal Rules of Criminal Procedure[4] authorize federal courts to punish summarily by fine or imprisonment contempts committed in their presence; both conviction and sentence are subject to appellate review for abuse of discretion.[5] When witnesses have not answered a series of questions intended to elicit the same fact, the courts have considered the refusals as one contempt.[6] Thus, where a

1. 18 U.S.C. § 2385 (1952).

2. The contempt sentence, however, was not to commence until after petitioner's release from custody following execution of the five-year sentence imposed upon her in the main case, Yates v. United States, 225 F.2d 146 (9th Cir.), *cert. granted,* 350 U.S. 860 (1955).

3. 18 U.S.C. § 401 (1952) provides: "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, . . . as . . . (3) disobedience or resistance to its lawful writ, process, order, rule, decree or command." 18 U.S.C. § 402 (1952) provides that contempt may be punished by fine, not exceeding $1,000, or by imprisonment, not exceeding six months, or both, but expressly excepts contempt committed in the presence of the court.

4. FED. R. CRIM. P. 42(a) states: "A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the presence of the court. . . ."

5. *Ex parte* Terry, 128 U.S. 289, 313 (1888); MacInnis v. United States, 191 F.2d 157, 162 (9th Cir. 1951); *In re* Maury, 205 Fed. 626 (9th Cir. 1913).

6. United States v. Orman, 207 F.2d 148, 160 (3rd Cir. 1953); United States v. Emspak, 95 F. Supp. 1012 (D.D.C. 1950); United States v. Yukio Abe, 95 F. Supp. 991, 992 (D. Hawaii 1951).

congressional committee[7] held that two separate refusals by a witness to give the name of a creditor constituted two contempts, the appellate court reversed on the ground that since both questions sought to establish but a single fact, only one penalty for contempt could be imposed.[8] Similarly, refusal to answer three separate inquiries as to whether defendant was a Communist was reduced on review from three contempts to only one.[9] The state cases treating this problem have reached the same result.[10] The general principle was extended in *United States v. Costello*,[11] ignored by the instant court, where defendant refused to answer a number of unrelated questions after declaring that for reasons of health he would not give further testimony that day. The Second Circuit held defendant guilty of only one criminal contempt. In reaching its result the court stated, "But when defendant made his position clear, the Committee could not multiply the contempt, and the punishment, by continuing to ask him questions each time eliciting the same answer: his refusal to give *any* further testimony." [12] The more subtle problem presented by the instant case is whether a court may punish as separate contempts refusals to answer a series of analogous questions designed to elicit a similar fact about different people. While it might be argued that the questions asked in the instant case did not ". . . seek to establish but a single fact, or relate to but a single subject of inquiry . . . ,"[13] the case does appear to fit within the *Costello* rule. Once petitioner had made clear her refusal to be an "informer," [14] further questions along the same lines could only receive the same answer.

While the court correctly found that the trial court was justified in punishing petitioner for contempt,[15] it does not appear from the opinion that the court considered the implications of treating the refusals as separate offenses. The court's result permits considerably larger punishments than are usual in contempt cases. Although the power under the federal statute to punish for contempt committed in the presence of the court is limited only by appellate review for abuse of discretion,[16] the

7. REV. STAT. § 102 (1875), 2 U.S.C. § 192 (1952) imposes a maximum sentence of twelve months for refusal to answer any question relative to any subject under investigation in a congressional committee. *Cf.* Lawson v. United States, 176 F.2d 49 (D.C. Cir. 1949).

8. United States v. Orman, 207 F.2d 148, 160 (3d Cir. 1953). The court held it proper to put each refusal in a separate count but, as they concerned only one subject of inquiry, the refusals were punishable as only one contempt.

9. United States v. Emspak, 95 F. Supp. 1012 (D.D.C. 1950).

10. Maxwell v. Rives, 11 Nev. 213 (1876); People *ex rel.* Amarante v. McDonnell, 100 N.Y.S.2d 463 (Sup. Ct. 1950); Fawick Airflex Co. v. United Electrical Workers, 87 Ohio App. 371, 92 N.E.2d 431 (1950).

11. 198 F.2d 200 (2d Cir.), *cert. denied*, 344 U.S. 874 (1952).

12. *Id.* at 204.

13. United States v. Orman, 207 F.2d 148, 160 (3d Cir. 1953).

14. Instant case at 854-55.

15. The judgment of the lower court was affirmed on the rationale that, once a witness waives the privilege against self-incrimination, he must answer any question proper and material to the inquiry. While this theory justifies the punishment for contempt, it cannot explain the punishment for multiple contempt.

16. Appellate courts have reversed for abuse of discretion on only a few occasions. See cases cited in note 5 *supra*. The Supreme Court noted in Weems v. United States,

district courts have in practice usually imposed a sentence of but three months or less.[17] In view of this practice, if a defendant were given an eleven-year sentence for one contempt it would clearly be held an abuse of discretion; however, if defendant were given eleven one-year sentences for eleven separate contempts, as in the instant case, but with the sentences to run consecutively, an appellate court could logically fail to find abuse. The result of the instant case has even greater import where there is a statutory limit to contempt punishment, for it might enable the courts to circumvent maximums established by the legislatures. All but three states have statutory maximums,[18] and a one-year maximum has been set for contempts committed before congressional committees.[19] In addition to the chance that a witness might be subjected to an unreasonably high punishment, there is a possibility that the threat of such punishment will encourage witnesses who might willingly answer other questions to claim fifth amendment immunity as to all.[20] Much valuable testimony could thereby be lost, as in the instant case where defendant was willing to reveal many facts—although withholding some—about both herself and some acquaintances. Finally, there is a danger that a clever interrogator, through the design of his questions, could control the length of time a recalcitrant witness would spend in jail. In view of these possibilities, it would have been far more desirable had the instant court followed the reasoning of the *Costello* case and treated the eleven refusals as one contempt.

217 U.S. 349, 368 (1910), that the "cruel and unusual" punishment test of the eighth amendment may be applicable to punishment which by its excessive length or severity may be greatly disproportionate to the offense charged. However, it appears that on only two other occasions has the Court found abuse of discretion in a contempt sentence. See Sacher v. Association of the Bar, 347 U.S. 388 (1954); United States v. United Mine Workers, 330 U.S. 258, 304 (1947).

17. *E.g.*, United States v. Gates, 176 F.2d 78 (2d Cir. 1949) (defendant in a Smith Act prosecution introduced an exhibit into evidence, but declined to state who prepared the exhibit under his direction; the penalty imposed was only thirty days in civil contempt); see Cooke v. United States, 267 U.S. 517 (1925); MacInnis v. United States, 191 F.2d 157 (9th Cir. 1951); Tosh v. West Ky. Coal Co., 252 Fed. 44 (6th Cir. 1918); *In re* Stein, 7 F.2d 169 (N.D. Cal. 1925).

18. These are New Hampshire, Rhode Island and Vermont. Sixteen have maximums for contempt committed out of the presence of the court but none for contempt in the presence of the court. Twenty-nine jurisdictions impose an overall limitation on punishment by all courts on every kind of contempt, including contempt committed in the presence of the court. Nine of these states provide a maximum imprisonment of six months; one has a maximum of three months; the rest have a maximum of thirty days or less. Brief for Appellant, pp. 29-30, Yates v. United States, 227 F.2d 851 (9th Cir. 1955).

19. See note 7 *supra*.

20. A witness invoking the fifth amendment is put under pressure to claim it as early as possible in order to avoid the possibility that the court will find that he has "waived" the privilege by answering prior questions. Rogers v. United States, 340 U.S. 367, 372-75 (1951), 37 VA. L. REV. 629. On the propriety of claiming the privilege in such circumstances see HUARD, THE FIFTH AMENDMENT—AN EVALUATION NOTE, 42 GEO. L.J. 345 (1954); and Notes, 4 CATHOLIC U.L. REV. 51 (1954); 32 NEB. L. REV. 577 (1953).

Even if a witness successfully invokes the fifth amendment to avoid possibility of heavy punishment where he is determined not to answer certain questions, he may still face unpleasant consequences. See Loew's, Inc. v. Cole, 185 F.2d 641 (9th Cir. 1950), *cert. denied*, 340 U.S. 954 (1951). See also Notes, 101 U. PA. L. REV. 1190 (1953); 39 MINN. L. REV. 75 (1954).

Labor Law—

WHEN NLRB DECLINES JURISDICTION OVER LABOR DISPUTE STATE COURT CAN TAKE JURISDICTION AND APPLY FEDERAL LAW

Defendant unions picketed plaintiff and dissuaded customers of the plaintiff-company from purchasing supplies in order to force plaintiff to sign a closed shop contract. Previously the National Labor Relations Board had refused jurisdiction to hold a representation election because plaintiff's interstate business was insufficient to meet the NLRB's self-imposed jurisdictional standards.[1] Plaintiff sued the unions in the state court and gained an injunction and damages.[2] On appeal, the California Supreme Court affirmed and held that, where the NLRB refuses jurisdiction over a representation election between parties who are in interstate commerce, the state court may assume jurisdiction and apply the Labor Management Relations Act[3] to an issue of unfair labor practices between the parties. *Garmon v. San Diego Building Trades Council,* 291 P.2d 1 (Cal. 1955) (4-3).

The Supreme Court has held that, if the provisions of the LMRA apply to a dispute, the states may not take jurisdiction of that issue.[4] An exception to this rule is found in section 10(a) of the LMRA[5] which allows state jurisdiction in those situations in which the NLRB cedes jurisdiction, case by case, to a state agency[6] that enforces a law not inconsistent with the federal act. Conduct neither protected nor prohibited by the LMRA may also be controlled by the states,[7] and a state may prevent violence incident to a labor dispute.[8] The scope of the LMRA

1. 19 NLRB ANN. REP. 2 (1954) sets forth the newest standards, promulgated in 1954. The discretionary taking of jurisdiction was upheld in NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 684 (1951) (dictum); Haleston Drug Stores, Inc. v. NLRB, 187 F.2d 418 (9th Cir.), *cert. denied,* 342 U.S. 815 (1951).

2. The employer contended successfully that if it signed the contract that the union offered, it would be coercing its employees to join a union of which, at the moment, none were members, and that such coercion was an unfair labor practice on the part of the employer. Labor Management Relations Act, 61 STAT. 140 (1947), as amended, 29 U.S.C. § 158(a)(3) (1952).

3. 61 STAT. 136 (1947), as amended, 29 U.S.C. §§ 141-97 (1952).

4. Weber v. Anheuser-Busch, Inc., 348 U.S. 468 (1955); Building Trades Council v. Kinard Constr. Co., 346 U.S. 933 (1954); Garner v. Teamsters Union, AFL, 346 U.S. 485 (1953).

5. 61 STAT. 146 (1947), as amended, 29 U.S.C. § 160(2) (1952).

6. Only eleven states have labor boards. Lorenz, *The Conflict of Jurisdiction,* 2 LAB. L.J. 887, 894 (1951). In the instant case no ceding of jurisdiction could take place since California has no labor agency. See instant case at 10 n.2.

7. International Union, United Automobile Workers, AFL v. Wisconsin Employment Relations Board, 336 U.S. 245 (1949).

8. Allen-Bradley Local 1111, United Electrical Workers v. Wisconsin Employment Relations Board, 315 U.S. 740 (1942).

includes all labor disputes affecting interstate commerce,[9] but the NLRB has not seen fit to exercise its full power, for budgetary reasons and has voluntarily limited its jurisdiction where the effect of the parties on interstate commerce falls below the announced standards.[10] The Supreme Court has noted but not settled the question of who has jurisdiction when the NLRB is empowered to act but declines to do so.[11] Some state and lower federal courts hold that only the NLRB can act in this field,[12] while others hold that once the NLRB declines jurisdiction the states may apply their local law to the issue even though the parties are in interstate commerce.[13] The instant case permits state jurisdiction but is novel in that it applies the LMRA and not the pertinent state law.[14]

The area between the theoretical limits of NLRB jurisdiction and its self-imposed jurisdictional standards may be considered a "no-man's land," [15] for, if the doctrine of federal preemption controls, and the Board refuses to act, the state courts cannot grant relief, and the wrong, if any, will remain unremedied. This would frustrate the national labor policy which has set standards to establish and maintain peace in labor relations, and would allow the parties to use methods deemed unfair labor practices by the LMRA. One solution to this problem would be to increase the size [16] and budget of the NLRB to enable it to meet its potential workload and thus be able to employ its expertise and specialized procedure in all labor

9. For a discussion of the scope of the LMRA, see Cox, *Federalism in the Law of Labor Relations,* 67 HARV. L. REV. 1297, 1345-48 (1954); Lorenz, *The Conflict of Jurisdiction,* 2 LAB. L.J. 887 (1951); Ratner, *Problems of Federal-State Jurisdiction in Labor Relations,* 3 LAB. L.J. 750, 766, 815 (1952).

10. The 1954 standard makes direct sales affecting commerce over $50,000, indirect sales affecting commerce over $100,000 or $200,000 depending on directness of utilization, direct purchases affecting commerce of $500,000 and indirect purchases of $1,000,000 sufficient to call forth NLRB jurisdiction. 19 NLRB ANN. REP. 2-3 (1954).

11. Building Trades Council v. Kinard Constr. Co., 346 U.S. 933 (1954), *reversing per curiam* 258 Ala. 500, 64 So. 2d 400 (1953).

12. Cooper Transport Co. v. Stufflebeam, 28 CCH Lab. Cas. ¶ 69,364 (Mo. 1955); Cooper Transport Co. v. Stufflebeam, 26 CCH Lab. Cas. ¶ 68,488 (Mo. 1954); Richman Bros. Co. v. Amalgamated Clothing Workers, 28 CCH Lab. Cas. ¶ 69,320 (C.P. Ohio 1955).

13. Your Food Stores v. Retail Clerks' Local 1564, AFL, 124 F. Supp. 697 (D.N.M. 1954), *rev'd,* 225 F.2d 659 (10th Cir. 1955); Hammer v. Local 211, United Textile Workers, AFL, 34 N.J. Super. 34, 111 A.2d 308 (Ch. 1954); see Caneer v. Retail Clerks Int'l Ass'n, 17 CCH Lab. Cas. ¶ 65,582 (Super. Ct. Cal. 1950).

14. For an interesting point on whether the NLRB must actually refuse jurisdiction in each case before the court may take jurisdiction, see Cain, Brogden & Cain, Inc. v. Local 47, International Brotherhood of Teamsters, 285 S.W.2d 942, 950 (Tex. 1956), which holds that an informal refusal to take jurisdiction by the NLRB is sufficient to give the state court jurisdiction. The instant case at 4 and 11-12 (dissenting opinion) discusses the point.

15. For a discussion of the "no-man's land" see Feldblum, *Jurisdictional "Tidelands" in Labor Relations,* 3 LAB. L.J. 114 (1952); Hays, *Federalism and Labor Relations in the United States,* 102 U. PA. L. REV. 959, 976-77 (1954); Note, 53 COLUM. L. REV. 258, 269-71 (1953).

16. A possible drawback to this proposal is that an increase in the size of the NLRB might lead to a rigidity in applying new policies or a slowdown in the decisional process. See Cox, *supra* note 9, at 1339-40.

problems affecting commerce. However, the present policy of the NLRB is rather to limit further its scope of jurisdiction and decrease its expenditures.[17] A second solution is to permit the state courts to take jurisdiction over the disputes in the "no-man's land" hiatus. Although the determination that the states may so take jurisdiction is subject to debate,[18] for the purposes of this discussion it is assumed that jurisdiction of a state agency in this "no-man's land" is permitted.

Given jurisdiction, the question arises whether the state court or administrative board should apply state or federal law.[19] The solution of this problem may be crucial in many cases such as the instant one where the unions' activity was legal under state law and illegal under federal law.[20] If state labor law is applied, the result is a loss of uniform national labor policy to the extent that state laws vary from the LMRA.[21] Moreover, since the exercise of jurisdiction by the NLRB is discretionary and occasionally the Board takes jurisdiction in cases falling below its announced standards,[22] there may be some confusion among the parties whether state or federal law will be applicable. Another potential result of the application of state law may be state competition for smaller industries, which fall below the NLRB's standards, by enactment of anti-union legislation.[23] On the other hand, if the federal LMRA is applied, the above difficulties are largely obviated; the one standard thought by Congress most likely to insure industrial peace will be applied uniformly to all parties affecting interstate trade. Yet, state court or state board en-

17. See Daykin, *NLRB Jurisdictional Standards: II,* 6 LAB. L.J. 696 (1955). In the fiscal year ending June 30, 1953, the NLRB expended 8.9 million dollars and closed 15,818 cases. 18 NLRB ANN. REP. 9, 93 (1953). This was under the 1950 standard. For a comparison of the 1950 and 1954 standards, see Sullivan, *"Affecting Interstate Commerce": Coverage of National Labor Relations Act,* U. ILL. L. FORUM 191, 195-208 (1955). In the fiscal year ending June 30, 1954, while still operating under the 1950 standard, the NLRB spent 8.78 million dollars and closed 13,989 cases 19 NLRB ANN. REP. 8, 155 (1954). The 1954 standard which requires a larger interstate business than the 1950 standard came into operation with the start of the 1954-55 fiscal year.

18. See note 9 *supra.*

19. In the instant case, the court characterized its application of federal law as required by state law and policy. Normally, state courts enforce federal statutes only when Congress expressly provides for state enforcement. See, *e.g.,* Federal Employers' Liability Act, 36 STAT. 291 (1910), as amended, 45 U.S.C. § 56 (1952); Fair Labor Standards Act, 52 STAT. 1069 (1938), as amended, 29 U.S.C. § 216(b) (1952); Emergency Price Control Act, 56 STAT. 33 (1942), as amended, 50 U.S.C. APP. § 925(c) (1946). The LMRA contains no such provision and only permits state enforcement when the NLRB cedes jurisdiction. See note 5 *supra.*

20. See instant case at 6-7.

21. The differences between the LMRA and state laws are readily apparent by comparing the following state laws with § 8 of the LMRA: N.Y. LAB. LAW § 704; PA. STAT. ANN. tit. 43, § 211.6 (Purdon 1952); S.C. CODE §§ 40-46 to -46.11 (Supp. 1955); UTAH CODE ANN. § 34-1-8 (1953).

22. *E.g.,* Westport Moving and Storage Co., 26 L.R.R.M. 1581 (NLRB 1950).

23. See Cox, *supra* note 9, at 1303. Recently, much anti-union legislation has taken the form of right-to-work statutes. Kuhlman, *Right-to-Work Laws: The Virginia Experience,* 6 LAB. L.J. 453 (1955). See Crook, *Recent Developments in the North-South Wage Differential,* 6 IND. & LAB. REL. REV. 67 (1952), which describes the southern movement of the textile industry.

forcement of the LMRA raises certain problems. First, most states do not have special agencies to deal with labor problems[24] and their courts do not have the expertise in deciding labor practice questions found in the NLRB. Unlike the federal courts which always have a NLRB ruling on an unfair practice before them, state courts will have to make the initial determination without the guidance of the Board except insofar as the Board's views can be ascertained from its prior decisions. Furthermore, state courts do not possess NLRB procedures to make rules and regulations.[25] Perhaps the most serious problem raised by a state tribunal enforcing federal law is the lack of procedures to effectuate the certification process which is a primary requisite of much union activity under the LMRA.[26] As a result, in this hiatus area it is impossible to give complete effect to federal law. Insofar as gaining recognition is concerned, unions must resort to economic pressure or alternate state processes if any are available. There arises then the further question of the legality of certain union demands, *e.g.*, the union shop, which would be an unfair labor practice under the LMRA if the union were not certified.[27] This might be overcome if the state tribunal would waive the requirement of certification where it is impossible to obtain. But this is merely an example of the interpolation necessary in order to reconcile the substantive law of the LMRA with the available procedures in the state attempting to administer the federal statute. The end result may be many different adjustments of the LMRA by state courts, thus defeating the major reason for invoking federal law: uniformity among all the states.

Nuisance—

DEFENDANT'S INTENTIONAL ATTRACTION TO HIS LAND OF WILD GEESE THAT DESTROYED PLAINTIFF'S CROPS SUPPORTS ACTION FOR PRIVATE NUISANCE

Plaintiff owns his farm from which he makes his living.[1] Defendant, an adjoining landowner, built a pond on his land about 400 feet from their common boundary; the pond is of little actual value to the defendant.

24. See note 6 *supra.*

25. 61 STAT. 140 (1947), 29 U.S.C. § 156 (1952).

26. 61 STAT. 143 (1947), as amended, 29 U.S.C. § 159 (1952).

27. A union may seek a contract provision requiring the firing of employees who do not become members on or after the thirtieth day following the start of employment ". . . (i) if such labor organization is the representative of the employees as provided in section 9(a) of this title. . . ." 61 STAT. 140 (1947), as amended, 29 U.S.C. § 158(a)(3) (1952). Section 9(a) provides for representation elections. See note 26 *supra.*

1. Since the instant case was decided on demurrer, the facts alleged by the plaintiff were taken as true and will be so treated in this Comment.

Defendant placed lame wild geese, food and bait on and around the pond in order to attract wild geese to it. He was successful in this endeavor, for increasingly large numbers of wild geese were attracted to winter on the pond.[2] In their foraging these geese destroyed plaintiff's crops.[3] Defendant knew, or should have known, that the natural consequence of attracting the geese to his pond would be the destruction of plaintiff's crops. Plaintiff claimed that the pond, lame wild geese and bait thereon constituted a nuisance, for which he sought damages and injunctive relief. The superior court sustained defendant's demurrer to the sufficiency of the complaint, but the Supreme Court of North Carolina reversed, holding that the complaint stated a cause of action for private nuisance. *Andrews v. Andrews,* 88 S.E.2d 88 (N.C. 1955).[4]

Private nuisance, a field of tort liability, arises out of an unreasonable interference with another's interest in the use of his own land.[5] It is based on the doctrine that one should so use his own property as not to injure that of another.[6] A cause of action for private nuisance is made out when the following is shown:[7] that the plaintiff had a property right in respect to the use interfered with; that the invasion was substantial; that the invasion was intentional[8] and unreasonable; and that the defendant's conduct was a substantial factor in bringing about the injury complained of.[9] Almost all of these elements clearly indicate a cause of action in the instant case. Destruction of crops has been held to be a sufficient invasion to create liability for a private nuisance.[10] Since the defendant created the pond with the knowledge that harm to the plaintiff's land was substantially certain to result, and continued it with the knowledge that harm was

2. It is alleged that from Oct. 1951 to June 1952 there were approximately 200 geese on the pond and that the damage to plaintiff's crops for that period was $48; that from Oct. 1952 to June 1953 there were approximately 1,200 geese on the pond and that the damage for that period was $105; and that from Oct. 1953 to June 1954 there were approximately 3,000 geese on the pond and that the damage for that period was $1,343.30. Instant case at 89-90.

3. The plaintiff's crops had never been molested previously by wild geese. Instant case at 89.

4. In a subsequent trial on the merits, plaintiff secured a judgment against the defendant and a permanent injunction to abate the nuisance. Letter from M. C. McLeod, attorney for plaintiff, to the *University of Pennsylvania Law Review,* Nov. 18, 1955, on file in Biddle Law Library, University of Pennsylvania Law School.

5. PROSSER, TORTS § 72 (2d ed. 1955); 4 RESTATEMENT, TORTS 220 (1939).

6. Morgan v. High Penn Oil Co., 238 N.C. 185, 193, 77 S.E.2d 682, 689 (1953) and cases cited therein.

7. 4 RESTATEMENT, TORTS § 822 (1939). A jury charge based on these factors was upheld in Soukoup v. Republic Steel Corp., 78 Ohio App. 87, 103-06, 66 N.E.2d 334, 341-43 (1946).

8. The conduct which gives rise to a private nuisance may be intentional, negligent or ultrahazardous. PROSSER, TORTS 392 (2d ed. 1955); 4 RESTATEMENT, TORTS § 822(d) (1939).

9. 4 RESTATEMENT, TORTS § 822(c) (1939); 2 *id.* § 431; see Connellan v. Coffey, 122 Conn. 136, 139, 142, 187 Atl. 901, 902, 904 (1936); Chase v. Washington Water Power Co., 62 Idaho 298, 305, 111 P.2d 872, 875 (1941).

10. United Verde Extension Mining Co. v. Ralston, 37 Ariz. 554, 296 Pac. 262 (1931) (crops damaged by sulphurous smoke).

resulting, his conduct was intentional.[11] His conduct also was unreasonable, as determined by weighing its utility against the harm to the plaintiff.[12]

It is on the final factor, whether or not the defendant's acts can be said to have been the proximate cause of plaintiff's injury, that difficulty may arise. Arguably, the injury was caused by the wild geese, so the defendant would be absolved on the ground that a superseding cause insulates him from liability.[13] However, according to one line of authority the intervening act of a human being or an animal which is a normal response to the situation created by the defendant is not such a superseding cause.[14] Thus, it has been held that potential customers of a cafeteria who formed lines on a sidewalk at mealtimes, thereby obstructing the entrance to plaintiff's store, constituted an enjoinable nuisance for which the restaurant owner was liable in damages.[15] Likewise, the Supreme Court of North Carolina held a defendant liable for negligently creating a situation in which mosquitoes could breed, thereby being the proximate cause of the plaintiff's contracting malaria.[16]

On the other hand, there is the doctrine illustrated by *Sickman v. United States* that one who neither owns, controls nor harbors an animal *ferae naturae* is not responsible for an injury done by it. In that case the Seventh Circuit held, on facts almost identical to the instant case, that the United States could not be held liable under the Federal Tort Claims Act[17] for the trespasses of animals which are *ferae naturae* and which exist in a state of nature.[18] It said that there was no ownership, control or possession of the wild geese there involved which could impose liability for their trespasses.[19] This broad statement of the test to be applied in determining liability for injury done by animals appears to be an overstatement of the law in this area. While a few cases hold that one who

11. Morgan v. High Penn Oil Co., 238 N.C. 185, 194, 77 S.E.2d 682, 689 (1953); PROSSER, TORTS 392 (2d ed. 1955); 4 RESTATEMENT, TORTS § 825 (1939).

12. See PROSSER, TORTS 410-16 (2d ed. 1955); 4 RESTATEMENT, TORTS §§ 826-28, 830 (1939).

13. Superior Oil Co. v. Richmond, 172 Miss. 407, 420, 159 So. 850, 852 (1935) (dictum); 2 RESTATEMENT, TORTS § 440 (1939).

14. 2 RESTATEMENT, TORTS § 443 (1939); Chicago, M., St. P. & Pac. Ry. v. Goldhammer, 79 F.2d 272, 274 (8th Cir. 1935), *cert. denied*, 296 U.S. 655 (1936) (dictum); Loftin v. McCrainie, 47 So. 2d 298, 301-02 (Fla. 1950) (dictum).

15. Shamhart v. Morrison Cafeteria Co., 159 Fla. 629, 32 So. 2d 727 (1947), *aff'd*, 160 Fla. 540, 35 So. 2d 842 (1948), 1 ALA. L. REV. 67; Tushbant v. Greenfield's, Inc., 308 Mich. 626, 14 N.W.2d 520 (1944) (injunction granted as modified).

16. Godfrey v. Western Carolina Power Co., 190 N.C. 24, 128 S.E. 485 (1925); see Towaliga Falls Power Co. v. Sims, 6 Ga. App. 749, 65 S.E. 844 (1909).

17. 28 U.S.C. § 2680(a) (1952).

18. 184 F.2d 616 (7th Cir. 1950), *cert. denied*, 341 U.S. 939 (1951). Wild geese wintering on a game preserve maintained by the United States were the cause of the damage to the plaintiffs' crops. Plaintiffs sued for damages on, among other things, a private nuisance theory. In a dual holding, the court held for the United States both on the merits and on the jurisdictional question under the Federal Tort Claims Act, 28 U.S.C. § 2680(a) (1952).

19. 184 F.2d at 618.

neither owns, controls or harbors an animal is not liable for any injury done by it,[20] others disregard this test and utilize usual tort principles.[21] All of the results of the cases which purport to use the test may be explained on other tort principles. For example, the court which finds that the defendant neither owned, controlled nor possessed an animal could also have found that there was no connection between any act or omission of the defendant and the injury done by the animal. Moreover, no case has been found, except for *Sickman,* using the test in a situation at all analogous to the instant one.[22] Even assuming the validity of the test, it is arguable that one who places wild geese, food and bait on a pond in order to attract wild geese to it has sufficient "control" over these animals to subject him to liability for their depredations.[23] It may further be noted that the application of a private nuisance theory in *Sickman* might result in non-liability, for a court could hold that the utility of the United States' maintaining a bird preserve outweighed the harm to the plaintiff and, therefore, was reasonable. But if the *Sickman* case cannot be distinguished and if it correctly states the law of liability for the trespasses of animals, then apparently the result in situations such as the instant case will turn on which doctrine is applied.[24] If this be so, then it is suggested that the "animal doctrine" be overruled, for it is at best a little used anachronism.

Venue—

CONSCIENTIOUS OBJECTOR FAILING TO REPORT FOR CIVILIAN WORK PROPERLY TRIED WHERE DRAFT BOARD LOCATED

Defendant, a resident of Oklahoma, was classified as a conscientious objector by his local draft board and ordered to report for civilian hospital work in Kansas. He communicated to the board his refusal to comply

20. *E.g.,* Hunt v. Hazen, 197 Ore. 637, 254 P.2d 210 (1953); Markwood v. McBroom, 110 Wash. 208, 211, 188 Pac. 521, 522 (1920); see White v. Lewis, 213 Miss. 686, 57 So. 2d 497 (1952) (court refused to grant an injunction against persons who neither owned nor controlled the offending animals). For a discussion of the conflicting English decisions on this point, see Comment, 34 N.C.L. REV. 149, 151-53 (1955) (commenting on instant case).

21. *E.g.,* a store owner who neither owns, keeps or possesses an animal may be held liable for injury done by it on the theory of a breach of his common-law duty to keep his premises safe for his customers. Andrews v. Jordan Marsh Co., 283 Mass. 158, 161, 186 N.E. 71, 72 (1933); see also Wilson v. Norumbega Park Co., 275 Mass. 422, 176 N.E. 514 (1931) (amusement park); Cruickshank v. Brockton Agricultural Soc'y, 260 Mass. 283, 157 N.E. 357 (1927) (fair exhibition); Westcott v. Seattle R. & S. Ry., 41 Wash. 618, 84 Pac. 588 (1906) (carrier).

22. *Cf.* cases cited in note 20 *supra.*

23. See Crawford v. Kansas City Stock Yards Co., 228 Mo. App. 673, 677-78, 73 S.W.2d 308, 311 (1934).

24. The dissent in the instant case relied entirely upon *Sickman* in stating that defendant was not liable. The majority opinion made no mention of *Sickman* in reaching its decision.

with the order and never entered Kansas where he was subsequently indicted for violation of the Universal Military Training and Service Act.[1] The federal district court dismissed the indictment for lack of proper venue on the ground that the offense was not committed in Kansas.[2] The Tenth Circuit affirmed, holding that for venue purposes the district of the draft board should be considered the place of the offense and trial. *United States v. Patteson,* 229 F.2d 257 (10th Cir.), *rev'd,* 351 U.S. 215 (1956).[2a]

Venue designates the particular district in which a court having jurisdiction may properly hear and determine the case.[3] The Federal Constitution requires that trial for a federal criminal offense be brought in the state where the crime was committed.[4] This venue provision, engendered by eighteenth century colonial abuses, was intended to protect defendants from the prejudice of trial at a place far from friends and witnesses.[5] Its guarantee is implemented further by the Federal Rules of Criminal Procedure which provide: ". . . the prosecution shall be had in a district in which the offense was committed. . . ."[6] However, the strict letter of these provisions does not clearly indicate the proper place of trial when a defendant so acts in one district that he fails to fulfill a duty owed to federal authorities in another district. This is because the constitutional and statutory specifications are geographic in nature,[7] and the failure to act is a status which cannot be located in geographical terms. This problem first was presented in several cases in which the omission was failure to file a report required by law. The Supreme Court held that venue was properly laid in the district where the office to which the report was due was located.[8] Subsequently, lower federal courts applied this rule to cases arising under the selective service acts. In several cases defendants who failed to report to their draft boards were held properly tried in the dis-

1. 62 STAT. 604 (1948), as amended, 50 U.S.C. APP. §§ 451-73 (1952).

2. United States v. Patteson, 132 F. Supp. 67 (D. Kan. 1955).

2a. In subsequently reversing, the Supreme Court held that the duty which the defendant failed to perform was to *report for employment.* "Accordingly venue must lie where the failure occurred." 351 U.S. at 222. Chief Justice Warren and Justices Black and Douglas dissented. Finding the issue to be one of statutory interpretation, the dissenters looked to the spirit of article III and the sixth amendment of the Constitution and concluded that "any doubt should be resolved in favor of the citizen." 351 U.S. at 224.

3. See *In re* Robertson, 127 F. Supp. 39, 40 (W.D. Mo. 1954); Paige v. Sinclair, 237 Mass. 482, 484, 130 N.E. 177, 179 (1921); Southern Sand & Gravel Co. v. Massaponax Sand & Gravel Corp., 145 Va. 317, 322, 133 S.E. 812, 813 (1926).

4. U.S. CONST. art. III, § 2, cl. 3.

5. Blume, *The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue,* 43 MICH. L. REV. 59, 63-66 (1944); Conner, *The Constitutional Right to a Trial by a Jury of the Vicinage,* 57 U. PA. L. REV. 197, 208 (1909). The discussions are directed at the vicinage requirement, U.S. CONST. amend. VI, but the same evils must also have inspired the venue provision.

6. FED. R. CRIM. P. 18.

7. See United States v. Anderson, 328 U.S. 699, 704-05 (1946).

8. Rumely v. McCarthy, 250 U.S. 283 (1919); United States v. Lombardo, 241 U.S. 73 (1916). For a later circuit court case, see United States v. Commerford, 64 F.2d 28 (2d Cir.), *cert. denied,* 289 U.S. 759 (1933).

tricts in which the boards were located although they lived elsewhere.[9] On facts nearly identical to those of the instant case, the Third Circuit has held that the crime was committed at the place to which the defendant failed to report.[10] The Tenth Circuit expressly rejected this view in the instant case.[11]

In the factual situation of the instant case the offense probably is sufficiently connected with both districts that Congress constitutionally could choose either of them as the place of the offense for purposes of venue.[12] Therefore, the issue presented is whether the purpose of the federal criminal venue requirements is better effectuated if trial is held in the district from which defendant refused to proceed or in the district to which defendant failed to report. The problem is important because conscientious objectors are almost always assigned to civilian work outside of their home communities and may be assigned to a distant state or territory.[13] Practically, the operation of the Third Circuit rule is subject to substantial objections. First, the Government must pay for transporting a clerk from the draft board with the records, and if the defendant fails to post bond, the Government will bear the expense of transporting him and the marshal having custody of him. Second, the defendant indicted in the district to which he is ordered to report is subjected to great hardship or prejudice. He must incur the expense of bringing character witnesses there for trial or forego the advantage of their testimony. Loss of time from his employment will increase the financial burden, and if he posts bond he must pay his own travelling expenses to the place of trial. Finally, the impecunious defendant faces the prospect of a criminal trial in a strange place without the psychological support of the presence of family or friends.[13a]

9. Jones v. Pescor, 169 F.2d 853 (8th Cir. 1948); Humes v. Pescor, 148 F.2d 127 (8th Cir. 1945); United States v. Van Den Berg, 139 F.2d 654 (7th Cir. 1944).

10. United States v. Johnston, 227 F.2d 745 (3d Cir. 1955), *aff'd*, 351 U.S. 215 (1956).

11. 229 F.2d at 259. The selective service statute imposes criminal penalties on anyone who ". . . knowingly fails, neglects, or refuses to obey an order of his local board. . . ." 62 STAT. 609, 622 (1948), as amended, 50 U.S.C. APP. §§ 456(j), 462(a) (1952). The Third Circuit opinion emphasized the defendant's *failure* to report, while the Tenth Circuit seemed to stress the defendant's *refusal* to report, but in each case the defendant's course of conduct was the same. A reading of the statute which permits the decision to turn on such a difference would have the improper result of allowing the wording of the indictment to control venue.

12. See text following notes 6 and 7 *supra*. In other situations federal law permits venue in more than one district. See United States v. Commerford, 64 F.2d 28 (2d Cir.), *cert. denied*, 289 U.S. 759 (1933); 18 U.S.C. § 3237 (1952). Similarly, in certain situations arising under state law venue may be proper in more than one county. See ALI CODE OF CRIMINAL PROCEDURE §§ 241, 243, 244, 245 (1930).

13. 32 C.F.R. §§ 1660.1(a)(1), 1660.21(a) (1954). As of January 20, 1955, there were over 1400 approved agencies located in the forty-eight states, in United States territories, and in foreign countries. NATIONAL SERVICE BOARD FOR RELIGIOUS OBJECTORS, AGENCIES AND INSTITUTIONS APPROVED FOR THE EMPLOYMENT OF CONSCIENTIOUS OBJECTORS IN CIVILIAN WORK OF NATIONAL HEALTH, SAFETY, OR INTEREST (1955).

13a. In reversing the instant case, the Supreme Court stated that "no showing of any arbitrary action appears [in this case]. . . ." 351 U.S. at 220. From this it may be inferred that an unreasonable selection of the place of assignment by the selective service board might not be effective to refuse venue at the place of reporting.

These handicaps may be especially significant in the case where a defendant is seeking judicial review of the administrative treatment of his case. By Supreme Court decision, the impropriety of selective service proceedings may be raised as a defense to criminal prosecution under the act only when defendant has exhausted his administrative remedies.[14] With respect to conscientious objectors assigned to civilian work, exhaustion seems to require that a registrant who has received notice of his work assignment report to the board, as directed, for final travel instructions and then refuse to proceed.[15] But the Third Circuit rule, which places the trial of the defendant in the district to which he was to report, forces a defendant, who may be protesting a prior administrative breach of the classification process, to seek judicial review wherever the board chooses to order him, although from an exhaustion of remedies point of view he would seem to qualify for trial in the district of his board. Inasmuch as his evidence probably is local, the defendant may be impeded in securing effective judicial review.

The Tenth Circuit rule would have obviated these difficulties while not unduly inconveniencing the prosecution. Evidence probative of the facts that defendant lawfully was ordered to report for duty and was notified of the order is located in the district of the board. The only witness which the Government may have to transport to trial is the person who will introduce the civilian agency's report of defendant's failure to appear for duty. But often such a witness is unnecessary since this fact is reflected in defendant's file and is usually stipulated by his counsel.[16]

---

14. Estep v. United States, 327 U.S. 114 (1946); Falbo v. United States, 320 U.S. 549 (1944). Though both of these cases arose under the Selective Training and Service Act of 1940, c. 720, 54 STAT. 885, legislative history of the penalties section, 12(a), indicates that their interpretation of exhaustion of administrative remedies was to apply to the 1948 act, 62 STAT. 622, 50 U.S.C. APP. § 462(a) (1952); S. REP. No. 1268, 80th Cong., 2d Sess. 20 (1948). This section has not been amended since then.

15. Prior to 1948 a conscientious objector opposed to noncombatant military service was assigned to a civilian public service camp, and since he might be rejected after a physical examination at the camp, he was required to report there before he was considered to have exhausted his administrative remedies. See note 14 *supra*. When a change in the regulations eliminated examinations at the camps, a conscientious objector was no longer required to report to camp in order to complete the administrative process and contest his classification in the courts. Dodez v. United States, 329 U.S. 338 (1946). The civilian public service camps no longer exist, and conscientious objectors opposed to noncombatant duty are assigned to work of national importance in civilian agencies. 65 STAT. 86 (1951), 50 U.S.C. APP. § 456(j) (Supp. 1955); see note 13 *supra*. Physical examinations are conducted prior to the order to report for work, and a conscientious objector would appear to have exhausted the administrative process when he reports to the board and receives his work orders. United States v. Sutter, 127 F. Supp. 109, 117 (S.D. Cal. 1954).

16. Letter from Hayden C. Covington, Esq., to the *University of Pennsylvania Law Review*, April 18, 1956, on file in Biddle Law Library, University of Pennsylvania Law School. In the situation where a conscientious objector fails to report to his board which is in a district other than that in which he is now living, the Tenth Circuit rule would seem to conflict with existing doctrine which lays venue in the district where the board is located. See note 9 *supra* and accompanying text. Since trial in this district would seem to involve the same hardship to the defendant

Clearly, the orderly administration of the criminal provisions of the draft laws requires a general test for determining venue, rather than an *ad hoc* policy determination in each case. In light of venue policy the Tenth Circuit reached a result preferable to that of the Third Circuit rule selected by the Supreme Court. Apparently, there is no general rule which can solve the problem of venue in cases involving various kinds of criminal omissions as the Third Circuit appeared to assume. Rather, the fact situation generally obtaining in any particular type of criminal omission must be considered in light of the purposes of the venue requirements before a proper rule for each type of omission can be formulated.

Zoning—

PENNSYLVANIA PERMITS ERECTION OF BUILDING ON LAND PREVIOUSLY DEVOTED TO A NONCONFORMING USE

Appellant operated a welding and automobile repair business in the garage at the rear of his property. He also used in his business a portion of this lot adjacent to the garage. In 1951 a zoning ordinance was enacted classifying as residential the area in which appellant's property was located. His business, therefore, became a nonconforming use. Two years later he applied for a permit to construct an addition to his garage to enclose the area of his lot already used in his business. The board of adjustment refused the permit and the court of common pleas affirmed.[1] On appeal the Supreme Court of Pennsylvania reversed, holding that under article V, section 1(a) of the ordinance, which permits the continuation of existing nonconforming uses of land, the appellant had the right to enclose with a building the portion of his lot used in his business at the time of the adoption of the ordinance. *Peirce Appeal,* 384 Pa. 100, 119 A.2d 506 (1956).

The zoning ordinance[2] provides in article III, section 2(2) that henceforth no land shall be used or building erected except in conformity

as does the Third Circuit rule in the instant situation, the Tenth Circuit, in order to be consistent, apparently would have to place venue in the district in which the defendant lived. This result does not necessarily follow because the defendant probably once resided in the district where he registered and he may have friends and character witnesses available there. Moreover, since such a defendant himself determines his distance from the district of his draft board, it is reasonable to give greater weight to the convenience of the Government.

1. Opinion filed in Common Pleas Court of Beaver County, Pa., by P.J. Robert E. McCreary, Feb. 21, 1955.

2. The relevant sections of the zoning ordinance provide:

". . . Article III, Section 2(2) . . . Hereafter no land shall be used or occupied, and no building or structure shall be erected, altered, used or occupied

with the ordinance. Article V contains an exemption from this provision: section 1(a) permits the continuation of an existing nonconforming use of land, and section 1(b) permits the continuation of an existing nonconforming use of a building provided that no structural alterations are made.[3] Thus, since appellant's business is a nonconforming use, his permit should have been refused unless the proposed addition was a continuation of the land use and neither a structural alteration nor a new building. The Pennsylvania Supreme Court has interpreted nonconforming land use provisions similar to article V, section 1(a) as permitting the expansion of an existing nonconforming use over the entire tract occupied at the time of the passage of the zoning ordinance if necessary to meet the requirements of normal growth of the business.[4] An excavating business was allowed to extend its operations in depth and area;[5] and the intensified utilization of a tract of land by the installation of additional underground storage tanks was similarly permitted.[6] A structural alteration in a nonconforming building, on the other hand, as prohibited by article V, section 1(b), is defined as the change of an old building in such a way as to convert it into a new or substantially different structure.[7]

The cases permitting expansion of an existing nonconforming land use[8] authorize appellant to do a greater volume of business on the land area used at the time of the passage of the ordinance and to expand his business over his entire tract of land. But neither the cases nor the language of section 1(a) purport to determine whether he can enlarge

---

except in conformity with the regulations herein established for the district in which such land, building or structure is located.

". . . Article V . . . Section 1. (a) The lawful use of land existing at the time of the adoption of this ordinance, although such use does not conform to the provisions hereof, may be continued. . . .

(b) The lawful use of a building, existing at the time of the adoption of this ordinance may be continued, although such use does not conform to the provisions hereof, and such use may be extended throughout the building, provided no structural alterations are made other than those ordered . . . to assure the safety of the building or structure. . . ."

Ordinance No. 411, Borough of Beaver, Pa. (1951), as quoted in *In re:* Appeal of Peirce, 15 Beaver County L.J. 186, 190-91 (Beaver County, Pa. C.P. 1953).

3. Alterations are permitted for reasons not relevant to this case. See note 2 *supra.*

4. Humphreys v. Stuart Realty Corp., 364 Pa. 616, 73 A.2d 407 (1950); Borough of Cheswick v. Bechman, 352 Pa. 79, 42 A.2d 60 (1945); Gilfillan's Permit, 291 Pa. 358, 362, 140 Atl. 136, 138 (1927).

5. Borough of Cheswick v. Bechman, *supra* note 4.

6. Humphreys v. Stuart Realty Corp., 364 Pa. 616, 73 A.2d 407 (1950).

7. Selligman v. Von Allmen Bros., Inc., 297 Ky. 121, 125, 179 S.W.2d 207, 209 (1944) (replacing wooden walls with brick ones is a structural alteration) and cases cited therein; Paye v. City of Grosse Pointe, 279 Mich. 254, 257-59, 271 N.W. 826, 827-28 (1937) (replacing building front is not a structural alteration); 1 YOKLEY, ZONING LAW AND PRACTICE § 155 (2d ed. 1953).

8. See cases cited in note 4 *supra.*

his business by erecting an additional building.[9] This was recognized in *Humphreys v. Stuart Realty Corp.*, where the Pennsylvania court noted that ". . . permissible enlargement of the use does not warrant the erection of new buildings or structures or any additions to buildings. . . ."[10] Furthermore, section 1(a) permits only the continued *use of land;* it would seem that appellant's business involves the same *use of land*[11] whether or not it is conducted within a building. Thus, while section 1(a) does not prohibit the proposed addition, neither does it authorize it. At the same time, section 1(b) appears to forbid the addition. The instant court stated that the section 1(b) prohibition on structural alterations had no bearing on this case since the only change in the existing building would be the removal of the wall on the side abutting the new building.[12] The distinction between constructing a new wing, which presumably would be a structural alteration, and erecting a new building and then connecting it to the old one seems insignificant. Judged by the definition of structural alteration given above,[13] the proposed addition would seem to qualify as such. But it makes no difference whether the proposed addition is a structural alteration or a new building, as both are expressly prohibited by the ordinance, the former by article V, section 1(b) and the latter by article III, section 2(2).[14] Thus, appellant's permit should have been refused.

By determining that the proposed addition is a permissible extension of an existing land use the instant court has denied force to article V, section 1(b). Since the policy behind the prohibition of structural alterations is to prevent one from indefinitely prolonging the life of a nonconforming building,[15] the spirit as well as the letter of section 1(b) argues against the instant court's result. But although the granting of appellant's permit under article V seems improper, he may nevertheless be entitled to a building permit. The zoning ordinance provides for the issuance of variances where a literal enforcement of the provisions of the ordinance will result in unnecessary hardship and where there will be no detriment to

9. *Cf.* Butler v. Louisville & Jefferson County Bd. of Zoning Adjustment & Appeals, 311 Ky. 663, 224 S.W.2d 658 (1949) (enlargement of building for a nonconforming use permitted since ordinance prohibiting structural alterations had been repealed).

10. 364 Pa. 616, 621, 73 A.2d 407, 409 (1950). This case was cited by the instant court, instant case at 105, 119 A.2d at 511, only for the proposition in the text at note 4 *supra.*

11. For discussion of the term "use of land," see Note, *Nonconforming Uses: A Rationale and an Approach,* 102 U. PA. L. REV. 91, 94-97 (1953).

12. Instant case at 107, 119 A.2d at 510.

13. See text at note 7 *supra.*

14. See note 2 *supra.*

15. Selligman v. Von Allmen Bros., Inc., 297 Ky. 121, 125-26, 179 S.W.2d 207, 209 (1944); 1 YOKLEY, ZONING LAW AND PRACTICE 377, 380 (2d ed. 1953); Note, *Elimination of Nonconforming Uses,* 35 VA. L. REV. 348, 352 & n.33 (1949); see Note, *Nonconforming Uses: A Rationale and an Approach,* 102 U. PA. L. REV. 91, 97-100 (1953); *cf.* Rehfeld v. San Francisco, 218 Cal. 83, 84, 21 P.2d 419, 420 (1933).

the public interest.[16] By its result the instant court has, in effect, granted a variance, but without requiring appellant to satisfy the requirements necessary to obtain one.[17]

---

16. Ordinance No. 411, art. VIII, § H, Borough of Beaver, Pa. (1951), quoted in *In re:* Appeal of Peirce, 15 Beaver County L.J. 186, 192 (Beaver County, Pa., C.P. 1953). For the type of hardship required, see Note, *Zoning Variances and Exceptions: The Philadelphia Experience,* 103 U. PA. L. REV. 516, 520-23 (1955).

17. See Blanarik Appeal, 375 Pa. 209, 100 A.2d 58 (1953) (variance granted on facts similar to those in instant case). *But cf.* Note, *Elimination of Nonconforming Uses,* 35 VA. L. REV. 348, 353 (1949).